SUPREME COURT. U. S.
SEP 5 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

J. WARD O'NEILL,
Counsel for Petitioners,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
of Counsel.

INDEX

	PAGE
Opinions of the Courts below	1
Jurisdiction	2
Questions Presented	2
The Statute Involved	3
Statement	3
Summary of Argument	11
POINT I—The respondent is limited to a suit under the laws of the State of New Jersey	16
POINT II—The jurisdiction of the District Court to entertain this suit in admiralty did not alter the fact that the Court was required to apply New Jersey law just as though the action had been brought against the petitioners in one of the courts of the State of New Jersey	20
POINT III—The respondent is not entitled to proceed against the petitioners on the grounds of the alleged unseaworthiness of the vessel, not only because the right to recover for unseaworthiness derives from the Federal Maritime Law, but also because the breach of a warranty of seaworthiness is not a wrongful act, neglect or default	23
POINT IV—The Wrongful Death Act of New Jersey is not a survival statute	33
POINT V—The owners of the vessel did not warrant the seaworthiness of conditions in No. 3 shelter deck to the deceased	38
POINT VI—The petitioners cannot be held liable to the respondent in terms of negligence under applicable decisions of the Courts of the State of New Jersey	42
Conclusion	58

Table of Cases Cited

PAGE

Blake v. Midland Railway Company, 18 Q. B. 93, 29 L. J. Q. B. 233, 16 Jur. 562 (1852) 36

Boudoin v. Lykes Bros. S.S. Co., Inc., 348 U. S. 336 (1955) 24

Broeker v. Armstrong Cork Company, 128 N. J. L. 3, 24 A. 2d 194 (1942) 15, 54, 56

Bruszewski v. Isthmian S.S. Co., 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948) 15, 40, 55

Byars v. Moore-McCormack Lines, 155 F. 2d 507 (2 C. A. 1956) 15, 39, 55

Byrd v. Napoleon Avenue Ferry Co., 125 F. Supp. 573 (E. D. La. 1954), affirmed on opinion below, 227 F. 2d 95 (5 C. A. 1955), cert. den. 351 U. S. 925 (1956) 22

Cooper v. Shore Electric Co., 63 N. J. L. 558, 44 Atl. 630 (1899) 36

Cosmopolitan Shipping Company v. McAllister, 337 U. S. 783 (1949) 16

Curtis v. Garcia Y Cia., 241 F. 2d 30 (3 C. A. 1957) .. 22, 34

Dalehite v. United States, 346 U. S. 15 (1953) 14, 27

Feinman v. A. H. Bull Steamship Co., 216 F. 2d 393 (3 C. A. 1954) 52, 53

Filipek v. Moore-McCormack Lines, 156 F. Supp. 854 (E. D. N. Y. 1957, now on appeal to the United States Court of Appeals for the Second Circuit) .. 41

Garrett v. Moore-McCormack, 317 U. S. 239 (1942) .. 16, 22

Graham v. A. Lusi, Ltd., 206 F. 2d 223 (5 C. A. 1953) 22, 30, 37

Harrisburg, The, 119 U. S. 199 (1886) 12, 18, 21

Hill v. Waterman, 281 F. 2d 655 (3 C. A. 1958) 22

H. S. Inc., No. 72, The, 130 F. 2d 341 (3 C. A. 1942) .. 22

Just v. Chambers, 312 U. S. 383 (1941) 19, 20

PAGE

Kernan v. American Dredging Co., 355 U. S. 426 (1958) 14, 18, 25, 34
Klingseisen v. Costanzo Transportation Co., 11 F. 2d 902 (3 C. A. 1939) 22
Lee v. Pure Oil Company, 218 F. 2d 711 (6 C. A. (1955) 32, 37
Levinson v. Deupree, 345 U. S. 648 (1952) 12, 19, 21
Lokar v. Church of The Sacred Heart, 24 N. J. 549, 133 A. 2d 12 (1957) 57
McAllister v. United States, 348 U. S. 19 (1954) 44
McDaniel v. M/S Lisholt, 155 F. Supp. 614 (S. D. N. Y. 1957), aff'd —F. 2d — (2 C. A. 1958) 41
Mergel v. Colgate-Palmolive-Peet Co., 41 N. J. Super. 372, 125 A. 2d 292 (1956) 15, 57
Newbury v. American Stores Co., 115 N. J. L. 604, 180 Atl. 75 (1935) 15, 57
Pinion v. Mississippi Shipping Co., 156 F. Supp. 652 (E. D. La. 1957) 41
Pope & Talbot, Inc., v. Hawn, 346 U. S. 406 (1953), 13, 25, 52
Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946) 13, 14, 23, 26, 28, 31, 40, 41
Senko v. La Crosse Dredging Corp., 352 U. S. 370 (1957) 17
Seward v. Vera Cruz, 10 App. Cas. 59 (House of Lords, 1884) 36
Swanson v. Marra Bros., Inc., 328 U. S. 1 (1946) 17
Turon v. J. & L. Construction Company, 8 N. J. 543, 86 A. 2d 192 (1952) 36
Western Fuel Co. v. Garcia, 257 U. S. 233 (1921) .. 12, 19, 20, 21

Statutory Authorities Cited

PAGE

Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. Section 761, et seq. 17, 26

Federal Rules of Civil Procedure, Rule 52(a) 44

Federal Tort Claims Act, 60 Stat. 842, 62 Stat. 869, 992, 28 U. S. C. § 1346(b) 27

Florida Wrongful Death Act (Title 43, Chapter 768 § 1; F. S. A. §768.01) 30, 37

Jones Act, 41 Stat. 1007, 46 U. S. C. § 688 16

Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424, 33 U. S. C. Section 901 et seq. .. 17

Lord Campbell's Act (9 and 10 Vict. c. 93) 36

New Jersey Survival Statute, Rev. Stat. N. J. 2A: 15-2; N. J. S. A. 2A:15-2 ..... 4, 12, 33

New Jersey Wrongful Death Act, Rev. Stat. N. J. 2A:31-1 et seq.; N. J. S. A. 2A:31-1 et seq. .. 3, 4, 12, 19, 26, 33, 35, 36

Tennessee Death Statute (Title 20, § 607 of the Tennessee Code) 32, 37

Supreme Court of the United States

October Term, 1958

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

Opinions of the Courts Below

The opinion of the United States District Court for the District of New Jersey (Alfred E. Modarelli, U. S. D. J.), dismissing the libel is reported at 141 F. Supp. 653, and is set forth on pages 570-577 of the Record.

The majority opinion of the United States Court of Appeals for the Third Circuit (Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley) and the dissenting opinion (Circuit Judges Maris, Kalodner and Hastie) are reported at 252 F. 2d 14 and are set forth on pages 582-596 of the Record.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 23, 1957.

The petition for a writ of certiorari was filed on March 24, 1958, and was granted June 9, 1958.

The jurisdiction of this Court to grant the writ of certiorari is provided by Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Whether a federal court may engraft concepts of liability peculiar only to the federal maritime law upon the wrongful death act of a state in the absence of any state statutes or authorities incorporating such concepts into that act?

2. Whether a federal court may attribute to the legislature of a state an *in futuro* intent to incorporate into the wrongful death act of that state substantive provisions of the federal maritime law when there is total lack of evidence of such intent on the part of that legislature either at the time of enactment or at any later date?

3. Whether, in any event, a shipowner owes a warranty of seaworthiness to a repairman, employed by an independent contractor, as to an obvious condition aboard the vessel created by a failure of the contractor's equipment, which very equipment he comes aboard to repair?

4. Whether a shipowner is under a duty to provide a safe place to work to a repairman employed by an independent contractor with respect to obvious conditions created aboard the vessel by the failure of the contractor's equipment, when the repairman comes aboard the vessel to repair that equipment with full knowledge of the facts?

The Statute Involved

The libellant sued in the United States District Court for the District of New Jersey to recover damages under the New Jersey Wrongful Death Act, Rev. Stat. N. J. 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*, the relevant section which read as follows:

> "2A:31-1. When Action Lies
>
> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

• • •

Statement

The libelant-respondent filed a libel (R. 3) in the United States District Court for the Southern District of New York to recover damages for the death of her husband, which occurred aboard m/v Tungus on December 6, 1952 while that vessel was moored in Bayonne, New Jersey. The deceased was an employee of El Dorado Oil Works, the respondent-impleaded, at the time of his death (R. 5, 129, 227). Four causes of action were set forth in the libel.

The first two sought to recover under the New Jersey Wrongful Death Act (Rev. Stat. N. J. 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*). The third and fourth causes of action in the libel sought to recover for the damages which had accrued to the deceased in terms of conscious pain and suffering, medical expenses, etc., presumably under the New Jersey Survival Statute (Rev. Stat. N. J. 2A:15-2; N. J. S. A. 2A:15-2), since such damages are not recoverable under the Wrongful Death Act.

The petitioners, the owners of m/v Tungus, successfully moved for a change of venue to the United States District Court for the District of New Jersey in order to permit them to serve an impleading petition upon El Dorado Oil Works (R. 33).

The chronological facts giving rise to the admiralty suit in the District Court were as follows:

In October, 1952, in the Philippines, m/v Tungus, a dry cargo merchant vessel owned by the petitioners, took on board two shipments of coconut oil in bulk, which were loaded into the two deeptanks (R. 293, Exh. R-6, R. 557, 297) in No. 3 shelter deck. In accordance with the terms of the contract of carriage this coconut oil was loaded at the expense of and with the equipment of the shipper (R. 314). The contract for the carriage of the oil also specified that the oil was to be discharged at the "sole risk and expense of the consignee," and that the consignee was also obligated to provide necessary equipment for the discharge (R. 314).

Upon the arrival of m/v Tungus in New York in December, 1952, the respondent-impleaded, El Dorado Oil Works, received instructions from the then owner of the coconut oil in the port deeptank to discharge the oil from that tank into El Dorado's storage facilities in Bayonne, New Jersey (R. 54, 55, 60, 61, 298, 570). The m/v Tungus was accordingly ordered to proceed from its own pier in Brooklyn to El Dorado's pier in Bayonne (R. 298).

Prior to the arrival of the vessel in Bayonne the deceased, who was Maintenance Foreman for El Dorado Oil Works, checked the operating condition of an electric centrifugal pump, owned by El Dorado (R. 57, 58, 62, 246), which was to be used by that company to discharge the oil. He was apparently "satisfied that she was in good working condition" (R. 246-7, 453, 454).

Upon the arrival of the vessel at El Dorado's pier in Bayonne, New Jersey, at approximately 5 p.m. on December 5, a survey of the oil in the port deeptank was made by Mr. Mallett, a surveyor representing the vessel, and by Mr. Sexton, El Dorado's Receiving and Shipping Foreman (R. 259, 260, 481). One officer and two members of the ship's crew assisted the El Dorado personnel in loading the discharging pump aboard the vessel. The two crew members were employed in driving the ship's winches (R. 299, 300). Under the direction of the El Dorado workers and by means of the winches, the lid of the port deeptank was first lifted, rotated 90 degrees, and then placed on top of the deeptank coamings (R. 239, 260, 261, 457). The placement of the tank lid can be seen in Exh. L-9 (R. 151) and Exh. R-2 (R. 258). El Dorado's pump, which had been lying on the pier, was then lifted by means of the ship's winches and lowered into No. 3 hatch and placed on top of the port deeptank lid (R. 457-458). The placement of this pump was directed by the El Dorado personnel (R. 239; interrogatory No. 15, R. 427; R. 457, 460).

The Trial Judge, in an opinion which constituted his findings of fact (R. 576), described this phase of the operation as follows:

> "Under the supervision of the El Dorado workers, two of the ship's crew operated winches; they were aided by one officer of the ship; the port deeptank lid was lifted, rotated 90 degrees, and lowered to a position across the top of its coamings, so that the after third of the tank was opened. The El Dorado workers were satisfied with the position of the tank

> lid. A pump, owned by El Dorado, was lifted by the ship's winches and lowered into No. 3 shelter deck and placed on top of the port deeptank lid under the directions of an El Dorado worker. He also directed the rigging of the suction discharge hoses." (R. 570-1)

The El Dorado pump crew started discharging the oil from the port deeptank at about 8 p. m. (Exh. R-4, R. 554, 266; Exh. R-6, R. 560, 297).

The discharge of the oil from the deeptank was under the direct supervision and control of El Dorado personnel (R. 157, 187, 221, 229, 261, 430, 497). The Trial Court so found in its opinion (R. 570, 576).

Mr. Patrick Sexton, the receiving and shipping foreman for El Dorado was in charge of the discharging. Mr. Blaney, the Plant Superintendent for El Dorado testified as follows:

> "Q. And there is no question that this complete discharging was under your man, Patrick Sexton, is that right? A. There is no question." (R. 430)

Shortly after midnight on the morning of December 6, 1952, one of the officers of the vessel, while making a routine tour of the decks, looked down into the open shelter deck of No. 3 hatch and saw that the pump had burst and that tons of hot liquid coconut oil were being pumped directly into the shelter deck area (R. 188, 268, 304; Exh. R-4, R. 554, 266; Exh. R-6, R. 560, 297). At that time none of the El Dorado pump crew were in attendance, much less even aboard the vessel (R. 304; Exh. R-6, R. 560, 298).

In answers to interrogatories it was admitted by respondent-impleaded El Dorado that one member of the El Dorado pumping crew was *required* to remain on duty in number 3 shelter deck of the vessel to maintain a constant watch on the pump itself (R. 57, 62).

As a result of this failure of El Dorado's pump, liquid coconut oil covered the entire area of No. 3 shelter deck, including the top of both the port and starboard tank lids, the area forward of the tank coamings, and the area between the port and starboard tank coamings, and covered as well two steel hatch beams which were lying in a fore and aft direction between the port and starboard coamings (R. 143, 152, 153, 177, 190, 191, 269, 275, 276, 329, 346, 495, 505).

When this pump failure was discovered it was necessary for an officer to go ashore in order to find an El Dorado employee to turn off the pump, which in the meantime continued to pump oil into the general cargo spaces in No. 3 hatch (R. 188, 304). The pump was finally turned off by an El Dorado employee (R. 188, 304), and a wooden plug was driven into the fractured air injection nipple of the pump, where the failure had occurred (R. 188). The broken fitting was replaced by Donahue and Russo, two El Dorado employees (R. 155, 194), but not before they had squeegeed or pushed away the spilled oil in the working area around the pump (R. 155, 176-7, 199, 144, 491-3, 495). None of the El Dorado employees on duty, however, were able to regain pumping suction (R. 156, 196), because, as it later proved, the distance between the pump and the oil level in the deep tank was too great to regain suction. It was finally necessary to lower the pump into the partially open tank (R. 235, 240, 433, 473-5). In this manner the suction line length was reduced to the point where the pump was able to regain suction. Mr. Blaney testified that any stoppage of the pump at that stage of the discharge would necessitate lowering the pump into the partially open tank (R. 235) in order to regain suction. This fact explains why it was not possible to discharge the tank through the small manhole in the lid (R. 277-8). The Trial Court found that it was necessary to have the tank open (R. 575).

As a result of this inability to resume pumping Carl Skovgaard, El Dorado's Maintenance Foreman, was called

from his home in the middle of the night. It will be recalled that Skovgaard was the one who had checked the operation of the pump prior to the arrival of the vessel at the pier the previous afternoon. At least two El Dorado employees claimed that they were the ones who had called Skovgaard at his home by telephone (R. 156-7, 507). Skovgaard was told about the conditions existing in No. 3 shelter deck by Patrick Sexton, the El Dorado foreman (R. 507). Donahue also testified that it was he who telephoned Skovgaard and told him "about the condition of the pump, and the trouble we were having" (R. 156-7).

After having been so summoned, the deceased left his home and shortly later boarded the m/v Tungus. The deceased first observed the conditions in No. 3 shelter deck by looking down into the open hatch from the main deck level (R. 156-7). The deceased was then down in No. 3 shelter deck itself observing conditions for some 10 or 15 minutes before his death (R. 158, 219-20, 484-6).

The next sequence of events was found by the Trial Court to be as follows:

> "In moving from the foot of the ladder leading down from the main deck to the shelter deck, Skovgaard walked through the area over which the oil had spilled. As he walked aft of the port tank he stepped on either one or both of the hatch beams; then as he attempted to step onto the top of the tank, he slipped on the spilled oil and fell to his death into 8 feet of hot oil contained in the hatch opening of the port tank." (R. 573)

These findings find full support in the record (R. 158-9, 197, 225, 442, 486).

There is not one word of testimony in the record as to any request having been made by the deceased or by any other El Dorado employee to the officers or crew of the vessel to have the conditions in No. 3 shelter deck altered or remedied in any way either before or after the spill oc-

curred. As a matter of fact the El Dorado employees stated specifically that they were satisfied with the conditions and the placement of the equipment (R. 180-1, 461, 469, 491-3).

The Chief Officer of the vessel, Mr. Folkman, testified that after the pump's failure and before the arrival of the deceased aboard the vessel he had offered sand or sawdust to Patrick Sexton, the Receiving and Shipping Foreman of El Dorado, for spreading in the shelter deck, but that his offer was sharply refused (R. 305, 308-9, 331, 349). This offer finds substantiation in the vessel's log entry made pertaining to this entire incident (Exh. R—6, R. 560, 297). Mr. Sexton, however, when called as a witness, denied that any such offer was made by the Chief Officer (R. 484). His denial was rendered totally academic, since he also testified as follows:

> "Q. Now, as receiving clerk in charge of receiving the oil, it would be up to you to say whether or not anything could be put on that oil so it wouldn't be left slippery, isn't that so? A. That is so, yes.
>
> Q. And after inspecting that area you gave no instructions to the men that were working there, is that correct? A. In my opinion, at that time, I thought that the area was clean enough. They [El Dorado employees] had squeegeed it." (R. 493)

The foregoing testimony referred to the time between the pump's failure and the death of the deceased.

The plant Superintendent of El Dorado, Mr. Blaney, testified that the pump's air injection nipple had broken off as a result of "normal vibration" of the pump (R. 430), and admitted that the air injection nipple was not an integral part of the pump (R. 429-30), but had been added to the pump by El Dorado out of parts already in stock at the plant (R. 430).

Upon the foregoing facts this suit came on for trial in the United States District Court for the District of New

Jersey before District Judge Modarelli in November, 1955. On June 11, 1956 Judge Modarelli filed an opinion holding the petitioners not liable for the death of the deceased (R. 570-7). Judgment was accordingly entered dismissing the libel and consequently dismissing the impleading petition as well (R. 577). After libelant filed a notice of appeal to the United States Court of Appeals for the Third Circuit (R. 577-8), the petitioners filed a precautionary notice of appeal to the same Court from the dismissal of the impleading petition in order to preserve their rights under the impleading petition (R. 579-80).

Both appeals were argued in the United States Court of Appeals for the Third Circuit on February 8, 1957 before Circuit Judges McLaughlin, Staley and Hastie. On June 27, 1957, the Court of Appeals handed down an order calling for reargument of the appeals before the Court *en Banc* (R. 580-1). On October 22, 1957 the appeals were reargued before the full bench of seven judges.

On December 23, 1957 the opinion of the Court was filed and judgment entered (R. 681-97). The majority of four, consisting of Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley called for a reversal of the judgment of the District Court on the grounds that the respondents owed a warranty of seaworthiness to the deceased and were in addition under a duty to provide him with a safe place to work. The dissenting minority of three, consisting of Circuit Judges Maris, Kalodner and Hastie felt that the majority of the Court had injected into the New Jersey Wrongful Death Act liability defining concepts peculiar only to and borrowed from the federal maritime law, and that since the federal maritime law afforded no rights (the deceased having died in state waters) such borrowing was improper. It was also the opinion of the minority that the seaworthiness of the vessel could not have been warranted to the deceased and under the New Jersey cases there could have been no breach of duty

to the respondents to provide the deceased with a safe place to work, since the danger was obvious to the deceased and since he came aboard to repair and restore to operation the very pump which had caused the oil spill.

Petitioners thereupon filed a petition for a writ of certiorari in this Court on March 24, 1958. On June 9, 1958, an order was entered allowing certiorari (R. 597).

Summary of Argument

The identities of the parties to this suit were as follows: The petitioners were the owners of the Norwegian m/v Tungus, a merchant vessel designed for the carriage of dry cargo, but having two deeptanks in her No. 3 shelter deck suitable for the carriage of oils in bulk. The respondent is the widow of Carl Skovgaard, deceased, who was Maintenance Foreman for El Dorado Oil Works. Respondent-impleaded El Dorado Oil Works was the employer of the deceased and had its employees aboard m/v Tungus on orders of the owner of the shipment of oil being carried in the port deeptank of the vessel. El Dorado was *not* engaged by petitioners, but by the consignee of the shipment, and El Dorado employees were aboard for the purpose of discharging the oil using their own equipment and personnel.

During the discharge of the shipment of coconut oil by El Dorado, which took place at El Dorado's pier in Bayonne, New Jersey, El Dorado's electrical discharging pump ruptured, causing several tons of hot liquid oil to be pumped directly into the shelter deck area where the El Dorado employees were supposed to be working. When El Dorado's pump crew could not get the pump operating again, they summoned the deceased from his home. The deceased boarded the vessel in the middle of the night, and after observing conditions from the main deck level, went down into No. 3 shelter deck in order to assist directly in

the further repairs of the pump. While in the close vicinity of the pump and while approaching the tank lid on which the pump had been placed the deceased slipped on the spilled oil and fell to his death into the deep tank.

His widow instituted a suit in admiralty in the United States District Court setting forth four causes of action, two under the New Jersey Wrongful Death Act (Rev. Stat. N. J. 2A:31-1 *et seq.*; N. J. S. A. 2A:31-1 *et seq.*) and two under the New Jersey Survival Statute (Rev. Stat. N. J. 2A:15-2; N. J. S. A. 2A:15-2). Since no damages were proven which might be recoverable under the latter statute, the attention of the Courts was focused on the first and second action under the Wrongful Death Act.

The New Jersey Wrongful Death Act predicates liability upon a "wrongful act, neglect or default" and, upon proof of such liability, awards damages in the form of compensation for "the pecuniary injuries resulting from such death".

Since the deceased met his death on navigable waters within the jurisdiction of one of the states, the substantive federal maritime law afforded no rights to his widow. *The Harrisburg,* 119 U. S. 199 (1886). Whereas the United States District Court, in admiralty, had jurisdiction to entertain the suit (*Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921)), the fact that the forum was a United States District Court, in admiralty, did not alter the fact that liability had to be determined solely by reference to the substantive provisions of the laws of the State of New Jersey and the decisions of the various Courts of the State of New Jersey. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921); *Levinson* v. *Deupree,* 345 U. S. 648 (1952).

The Trial Court held that the doctrine of unseaworthiness afforded no basis for a recovery by the respondent against the owners of the vessel, and held further that the owners of the vessel were not liable to the deceased or the

respondent under theories of negligence. The United States Court of Appeals for the Third Circuit in a 4-3 decision (sitting *en banc* on a reargument of the appeal), reversed the decision of the Trial Court. The majority bench of the United States Court of Appeals, while stating that respondent's rights in seeking redress for the death of her husband were necessarily limited to those under the New Jersey Wrongful Death Act, proceeded to hold that petitioners owed a warranty of seaworthiness to the deceased and further held that petitioners were under a duty to provide the deceased with a safe place in which to work. In support of these propositions the majority bench cited cases involving injured workers, who had rights under the federal maritime law and who were proceeding under that law rather than under any state statutes. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 (1953). We submit that there is not the slightest connection between the law as set forth in those two cases and the cases in the Courts of the State of New Jersey under which this suit must necessarily be decided.

There are no authorities in New Jersey which warrant the inclusion of a warranty of seaworthiness in the words "wrongful act, neglect or default", as used in the Wrongful Death Act of New Jersey. There is nothing that would indicate that the legislature of the State of New Jersey, when it enacted the Wrongful Death Act in 1848, with the same language, intended that warranties or theories of absolute liability without fault should form a basis for liability under the Act. Nor is there anything in the cases or the laws of the State of New Jersey which would indicate that it was the intention of its legislature to formulate a double standard—one creating liability for matters occurring ashore and the other creating different liabilities for matters occurring afloat on the navigable waters of the State.

The warranty of seaworthiness derives from the federal maritime law (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85

(1946); *Kernan* v. *American Dredging Co.*, 355 U. S. 426 (1958)), and is a species of liability wholly alien to concepts of fault or negligence. Unseaworthiness has never been a basis for a recovery under the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761, which uses the identical words "wrongful act, neglect or default". In *Dalehite* v. *United States*, 346 U. S. 15 (1953), this Court held that the words "wrongful act" in the Federal Tort Claims Act, 60 Stat. 842, 62 Stat. 869, 992, 28 U. S. C. § 1346(b), did not include theories of absolute liability without fault. The warranty of seaworthiness is a form of absolute liability which has been imposed by the federal maritime law upon those engaging in maritime services predicated upon the hazards of such service (*Seas Shipping Co.* v. *Sieracki, supra*). Since the federal maritime law affords no rights to this respondent, and since the New Jersey Wrongful Death Act makes no provisions for a recovery predicated upon warranties of seaworthiness, the respondent is necessarily limited to alleging negligence in seeking a recovery under that Act.

Even if this suit were to be decided under the federal maritime law, no warranty of seaworthiness would be owed to the deceased with respect to the conditions which proximately caused his death. The allegations of unseaworthiness would necessarily be pointed at either the broken pump of El Dorado or the oil spill which that pump created in breaking down. In either event the petitioners made no warranty of fitness or seaworthiness to the deceased, and the deceased himself was fully aware of the defective and broken condition of the pump, having come aboard for the purpose of repairing it, and was also fully aware, both from having been told and from personal observation, of the existence of the oil spill in the No. 3 shelter deck, where the pump was located.

The Courts of Appeals for the Second and Third Circuits have held in similar fact situations that no warranty

of seaworthiness was owed to the injared man. *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 507 (2 C. A. 1956); *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948).

Finally, we submit that the testimony in the record makes it clear that the repair of El Dorado's pump and the discharge of the oil was under the supervision and control of El Dorado and not under the supervision or control of the officers or the members of the crew of the vessel. The finding of the Trial Court to that effect was not held to be "clearly erroneous" by the United States Court of Appeals, and the finding of the Trial Court is fully supported in the record. Trial testimony referred to in the body of this brief points to the fact that the efforts of the Chief Officer to suggest corrective measures after the oil spill occurred (and before the death of the deceased) were rebuffed by El Dorado's supervisor. This supervisor conceded that the decision as to whether to spread sand or sawdust on the spilled oil was his to make and his alone. Since he was at that time of the opinion that no such measures were necessary, the No. 3 shelter deck, where the pump was located, was left as is, except for the fact that the El Dorado pump crew swept away some of the spilled oil from the immediate working area around the pump.

On such a set of facts the Courts of the State of New Jersey would hold that no duty would be owing to one in the category of the deceased, who not only came aboard to repair the very instrumentality which had caused the spill, but was also fully aware of the existing conditions. *Broecker* v. *Armstrong Cork Company*, 128 N. J. L. 3, 24 A. 2d 194 (1942); *Mergel* v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372, 125 A. 2d 292 (1956); *Newbury* v. *American Stores Co.*, 115 N. J. L. 604, 180 Atl. 75 (1935).

Since the respondent can look only to the law of the State of New Jersey for a determination of her rights to recover for the death of her husband, the aforementioned

cases in New Jersey Courts are determinative of her rights. Under them it is obvious that if this matter had been tried in one of the Courts of the State of New Jersey, recovery would have been denied to her. Since even the majority of the United States Court of Appeals below conceded that the respondent had no rights other than under the laws of the State of New Jersey, their conclusion that the petitioners were liable to the respondent in terms of unseaworthiness and negligence flies in the teeth of the New Jersey decisions. As stated in *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 245 (1942):

> " • • • and admiralty Courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State".

POINT I

The respondent is limited to a suit under the laws of the State of New Jersey.

The deceased, Carl Skovgaard, while employed by the respondent-impleaded, El Dorado Oil Works, met his death aboard m/v Tungus, a vessel owned by petitioners, while that vessel was moored at El Dorado's pier in Bayonne, New Jersey.

As such, the respondent, his personal representative and his widow, in suing to recover for his death, is necessarily limited to any causes of action which may be given to her by the laws of the State of New Jersey.

The respondent cannot proceed against the petitioners under the Jones Act, 41 Stat. 1007, 46 U. S. C. Section 688, not only because the deceased was not a member of the crew of m/v Tungus, but also because he was not employed by the petitioners, the owners of that vessel. As was held by this Court in *Cosmopolitan Shipping Company* v. *Mc-*

Allister, 337 U. S. 783 (1949), the Jones Act affords a right of recovery only against the employer, and the relationship of employer-employee must be shown to exist. In *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1 (1946) and *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370 (1957) this Court has also held that since passage of the Longshoreman's and Harbor Worker's Compensation Act of March 4, 1927, 44 Stat., 1424, 33 U. S. C. Section 901 *et seq.*, the benefits of the Jones Act have been restricted to members of the crew of the vessel. The Jones Act affords no basis for a recovery in the instant case.

A further statutory provision giving rights of action in maritime deaths is the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. Section 761 *et seq.* The Death on the High Seas Act, however, gives a cause of action only when "the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore" (46 U. S. C. Section 761). Carl Skovgaard met his death aboard m/v Tungus in waters under the jurisdiction of the State of New Jersey, and not on the high seas beyond a marine league from shore. The Death on the High Seas Act specifically left untouched a fact situation like the one presented, for in 46 U. S. C. Section 767 it is stated:

> "The provisions of any State giving or regulating rights of action or remedies for death shall not be affected by this chapter. * * * "

This section indicates the intention of Congress not to interfere with legislation of the States in the field of death occurring on waters within the jurisdiction of those States.

Finally, neither the common law nor the federal maritime law provide rights in the case of death. The rule under both the common law and the federal maritime law has always been and still is that the right of action, if any, dies with the person. This principle is well supported by

authorities, both in this Court and in the Courts of Appeal of the various circuits.

The most recent reference to the point is to be found in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 428 (1958), when Mr. Justice Brennan wrote:

> "But the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence."

On this particular point the four dissenting Justices of this Court concurred (355 U. S. 441).

These principles were enunciated by this Court as early as 1886 in *The Harrisburg*, 119 U. S. 199 (1886). This involved a suit *in rem* begun in the United States District Court for the Eastern District of Pennsylvania against the steamer Harrisburg by a widow to recover damages for the death of her husband allegedly caused by the negligence of that steamer in collision with another vessel. Mr. Chief Justice Waite at 119 U. S. 204 phrased one of the questions presented as follows:

> "1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor?"

After a most thorough review of earlier authorities Mr. Chief Justice Waite wrote at page 213:

> "Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in

matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

Later this proposition was reaffirmed in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240 (1921). That recovery for death cannot be had under the federal maritime law was restated by Mr. Chief Justice Hughes in *Just* v. *Chambers*, 312 U. S. 383, 391 (1941). To the same effect is the opinion of Mr. Justice Frankfurter in *Levinson* v. *Dupree*, 345 U. S. 648, 650 (1952).

It is apparent, therefore, that this respondent is limited in seeking recovery for the death of her husband, to whatever rights may be afforded to her under the statutes and laws of the State of New Jersey in whose jurisdiction the deceased met his death.

The majority opinion below as written by Circuit Judge Staley professed to recognize this limited basis for recovery by the respondent and recited the fact that redress for the death of Skovgaard would have to be based upon the statutes of New Jersey, more specifically the New Jersey Wrongful Death Act, Rev. Stat. N. J. 2A:31-1 et seq.; N. J. S. A. 2A:31-1 et seq. (R. 583).

We submit, however, that the majority of the bench below actually lost sight of the fact that no cause of action was given under the federal maritime law, and proceeded to dispose of the suit under that very law, holding that the respondent was entitled to recover on the basis of unseaworthiness of the vessel and under negligence principles set forth in various cases, which were in fact adjudicated under the federal maritime law.

POINT II

The jurisdiction of the District Court to entertain this suit in admiralty did not alter the fact that the Court was required to apply New Jersey law just as though the action had been brought against the petitioners in one of the courts of the State of New Jersey.

The right of the United States District Court, sitting in admiralty, to entertain this libel *in personam* under the New Jersey Wrongful Death Act is supported by such authorities as *Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921) and *Just* v. *Chambers,* 312 U. S. 383 (1940).

In *Western Fuel* v. *Garcia,* Mr. Justice McReynolds wrote as follows at 257 U. S. 242:

> "As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given."

In *Just* v. *Chambers,* 312 U. S. 383 (1941), Mr. Chief Justice Hughes referred to the fact that a right of action for death was denied by the federal maritime law, and in referring to the earlier authorities on that point wrote at page 388:

> "The absence of a federal or state statute giving a right of action was emphasized. But when a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it."

It being established that the United States District Court, in admiralty, was empowered to entertain the suit despite the fact that no right of action was given other

than under the laws of the State of New Jersey, the question arises as to what federal or state substantive principles are to be applied by that Court in determining the rights of the parties to the suit. Circuit Judge Hastie, in his dissenting opinion in the instant matter (R. 589), outlined the situation in the following terms:

> "A federal court is here asked to enforce a cause of action, the existence and dimensions of which are determined solely by the law and policy of New Jersey. True, the United States District Court which heard this case was sitting 'in admiralty'. But for present purposes this is significant only in that the practice properly followed in that forum is admiralty practice. Thus, the proper form of complaint in this case was a libel in the admiralty style. The shipowners could be reached by attaching the vessel in the classic admiralty manner. But beyond such matters of legal administration, the substantive concepts of admiralty had no effect as law in defining the claim. State law and it alone performed that function. Admiralty was merely the administering forum in a situation in which the maritime law itself did not even provide a cause of action for wrongful death."

In so writing Circuit Judge Hastie referred to the case of *Levinson* v. *Deupree*, 345 U. S. 648 (1952), where this Court held that a United States District Court, sitting in admiralty, in a suit under the Wrongful Death Act of Kentucky was bound to enforce a substantive provision of the laws of Kentucky

> "as it found it, but not bound beyond that to strive for uniformity of results in procedural niceties with the Courts of the jurisdiction which originated the *obligatio*."

This principle was not new having been enunciated by this Court earlier in *The Harrisburg, supra,* and *Western Fuel Co.* v. *Garcia, supra,* where this Court held that limitations which would bar a suit under the state law,

had the suit been instituted in a court of that state, would also serve to bar the suit, which was in fact brought in admiralty in the United States District Court.

Mr. Justice Black discussed the point in *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 245 (1942):

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State."

The Third Circuit had until now maintained an unbroken line of adherence to the idea that guiding principles of applicable state law were to be applied by a District Court sitting on an action under the wrongful death act of a state. *Klingseisen* v. *Costanzo Transportation Co.*, 11 F. 2d 902 (3 C. A. 1939), *The H. S. Inc.*, No. 72, 130 F. 2d 341 (3 C. A. 1942), *Curtis* v. *Garcia Y Cia.*, 241 F. 2d 30 (3 C. A. 1957) and *Hill* v. *Waterman*, 281 F. 2d 655 (3 C. A. 1958).

Judge Borah of the United States Court of Appeals for the Fifth Circuit adhered to the principle in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (5 C. A. 1953). To the same effect is the decision of the same Court in *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E. D. La., 1954), affirmed on opinion below, 227 F. 2d 95 (5 C. A. 1955), cert. den. 351 U. S. 925 (1956).

In short, the obligation of the United States District Court for the District of New Jersey and of the United States Court of Appeals for the Third Circuit was to dispose of the suit under the same principles and with the same results which would have obtained had this respond-

ent instituted suit against the petitioners in one of the Courts of the State of New Jersey. The principles of New Jersey negligence law must prevail. Since no federal statutes are involved and since the federal maritime law provides no rights, the law of the State of New Jersey stands alone and unchallenged. Those cases involving injuries in which the state law has been required to bow to applicable and therefor overriding federal maritime law are not in point.

POINT III

The respondent is not entitled to proceed against the petitioners on the grounds of the alleged unseaworthiness of the vessel, not only because the right to recover for unseaworthiness derives from the Federal Maritime Law, but also because the breach of a warranty of seaworthiness is not a wrongful act, neglect or default.

The four majority Judges in the United States Court of Appeals for the Third Circuit, in an opinion by Circuit Judge Staley have held that

> "The failure to provide a seaworthy vessel in the case before us is such 'wrongful act, neglect or default' as will allow recovery under New Jersey wrongful death statute." (R. 586)

In so holding the majority bench below have ignored the decisions of this Court which have held that the warranty of seaworthiness derives from the general maritime law and bears no similarity to concepts of negligence liability.

In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), Mr. Justice Rutledge wrote extensively on the nature of the warranty of seaworthiness. The principal question before this Court was whether the warranty of seaworthi-

ness was to be extended to a longshoreman injured while working aboard a vessel even though the injured man was not an employee of the owners. At the risk of quoting too familiar language we respectfully refer this Court to what was written at 328 U. S. 92:

> "It is true that the liability for unseaworthiness is often said to be an incident of the seaman's contract. But in all instances which have come to our attention this has been in situations where such a contract existed. Necessarily in such a setting the statement could have no reference to any issue over liability in the absence of such a contractual relation. Its function rather has been to refute other suggested restrictions which might be held to apply on the facts. Most often perhaps, these have been limitations arising from *the erroneous idea that the liability is founded in negligence* and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow-servant rule." (Emphasis supplied.)

In further describing the nature of unseaworthiness the Court wrote at page 94:

> "It [unseaworthiness] is essentially *a species of liability without fault*, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, *the liability is neither limited by conceptions of negligence* nor contractual in character." (Emphasis supplied.)

In *Boudoin* v. *Lykes Bros. SS. Co., Inc.*, 348 U. S. 336, 339 (1955), Mr. Justice Douglas in delivering the opinion of the Court wrote:

> "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is reasonably fit to carry the cargo'. *The Sylvia*, 171 U. S. 462, 464; *The Southwark*, 191 U. S. 1, 9. If it is not, the owner is liable, irrespective of any fault on his part. *The Osceola*, supra; *Seas Shipping Co.* v. *Sieracki*, supra."

In *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 (1953), Mr. Justice Black in commenting upon the origins of the warranty of seaworthiness wrote at 346 U. S. 409 as follows:

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law."

Mr. Justice Frankfurter, in the same case, wrote a concurring opinion and on this point stated:

> "The right of seamen to recover for unseaworthiness is peculiarly a cause of 'admiralty and maritime jurisdiction', 1 Stat. 73, 77. The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery although it may be relevant in assessing the damages. * * * We should not commingle federal admiralty and state common law and should not engraft onto the federally created right to recover for unseaworthiness a common-law defense foreign to that right". (346 U. S. 415)

Most recently, Mr. Justice Brennan commented upon the point in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 428 (1958):

> "The petitioner urges first that the statutory violation made the flotilla unseaworthy, creating liability without regard to fault. But the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness of by negligence."

The warranty of seaworthiness, therefore, is a creature of the general maritime law, restricted to maritime matters, having its roots in our federal maritime law, and partaking of none of the characteristics of negligence.

What justification is there, therefore, for Judge Staley's statement that "the New Jersey wrongful death statute adopts the maritime standard of care" (R. 588)? There is nothing in the decisions of the Courts of the State of

New Jersey, in the wording of the Wrongful Death Act itself or in the legislative history of the Act which would justify such a conclusion. It is significant that no authority has been cited by the majority of the United States Court of Appeals for the Third Circuit to justify the statement that the New Jersey Wrongful Death Act gave a cause of action for a breach of warranty of seaworthiness.

The New Jersey Wrongful Death Act with the original words "wrongful act, neglect or default" was enacted on March 3, 1948, some two years after the British Lord Campbell's Act (9 and 10 Vict. c. 93), on which the New Jersey statute was patterned. And yet the extension of the warranty of seaworthiness to those other than members of the crew of a vessel was not made until 98 years later in the decision of this Court in *Seas Shipping Co.* v. *Sieracki, supra.* As suggested in the dissenting opinion of Circuit Judge Hastie (R. 591) only bedlam can result if we are to ascribe to a state legislature an intention to incorporate interpretations of federal maritime law by our admiralty courts given almost a century after the legislation was enacted.

The decision of the United States Court of Appeals for the Third Circuit in the instant matter is totally unsupported by the law of the State of New Jersey in a situation where admittedly the laws of the State of New Jersey provide the sole right.

Light can be thrown on the meaning of the words "wrongful act, neglect or default" by reference to interpretations of other statutes using identical or similar language.

The opening section of the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761, reads as follows:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas * * * ".

The key words, of course, identical to those in the New Jersey Wrongful Death Act. It is most significant that a search of authorities and of decisions dealing with the Death on the High Seas Act has revealed no instance in which recovery under that Act has been predicated upon unseaworthiness of the vessel involved. Recovery has been limited strictly to acts of negligence.

A further Federal statute which is of assistance on this point is the Federal Tort Claims Act, 60 Stat. 842, 62 Stat. 869, 992, 28 U. S. C. § 1346 (b). That section of the Act states that the Federal District Courts, subject to the provisions of the Act, are to have:

> "* * * 'exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * *'".

It will be noted that the phrase "wrongful act" is used. Judge Staley, writing for the majority bench below, held that the breach of a warranty of seaworthiness was a "wrongful act" (R. 585). It might be noted that Judge Staley justified this interpretation by stating that:

> "It is the liability—creating quality of an act which makes it wrongful."

Reference to *Dalehite* v. *United States*, 346 U. S. 15 (1953), shows that this Court has not been as liberal as Judge Staley in its interpretation of the words "wrongful act". That was an action under the Federal Tort Claims Act by petitioners seeking damages from the United States for the death of one Henry G. Dalehite, which occurred in the explosion of FGAN at Texas City, Texas in April 1947, the incident commonly referred to as the Texas City Disaster. On pages 44 and 45 of the *Dalehite* opinion this Court rejected the contention that the language of the

Federal Tort Claims Act, including the words "wrongful act", embraced concepts of liability without fault or of absolute warranty. Mr. Justice Reed wrote as follows:

> "Though the findings of specific and general negligence do not support a judgment of government liability, there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the FGAN constituted a nuisance and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extra-hazardous activity'. *United States* v. *Hull,* 195 F. 2d 64, 67."

It will be noted that this Court agreed that there are certain situations in which absolute liability is imposed irrespective of how the person liable conducts himself. These are instances where the liability creating quality of the act does not necessarily mean that the act was "wrongful". In this day and age liability can and does arise irrespective of wrong, and for that reason we submit that Judge Staley's reasoning (R. 585) is faulty.

A prime example of the fact that the liability creating aspects of an act or condition need not be predicated upon wrongfulness is the absolute warranty of seaworthiness. Reference once more to the key case of *Seas Shipping*

Co. Inc. v. *Sieracki*, 828 U. S. 35 (1946), shows that the concept of a warranty of seaworthiness by a shipowner was not predicated upon wrong on his part, but rather upon the hazards of the trade which, this Court felt, justified imposing a liability upon a shipowner on a "spread the costs" theory rather than on any theories of wrong. This Court wrote as follows at 328 U. S. 93:

> "That the liability may not be either so founded or so limited [to situations where an employer-employee relationship existed] would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measureable in money, upon the owner regardless of his fault [citations]. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character."

The price which the shipping industry pays for engaging in what are termed to be "the hazards of maritime service" is that the shipping industry must bear the burden of absolute liability. That does not mean, of course, that to engage in shipowning is wrongful, only that it is hazardous.

Judge Staley has over-simplified his analysis of the words "wrongful act" when he states that anything which

produces liability must necessarily be wrongful. It should be obvious that our 20th century views on liability are not so restricted. Liability can and does arise every day without "wrong" in the sense that word was used by the Legislature of the State of New Jersey in 1846 when it enacted its counterpart of the British Load Campbell's Act.

Insofar as decisions emanating from the Courts of the State of New Jersey are concerned, no case has been found holding that the words "wrongful act, neglect or default", as used in the New Jersey Wrongful Death Act, include or were intended to include concepts of absolute liability or warranties of any sort, let alone a warranty of seaworthiness which would indicate that it was the intention of the legislature to create a double standard in the State of New Jersey—one standard for deaths occurring ashore and another standard for deaths occurring on waters of the State. To say that the legislature in 1848 intended one meaning to be applied as to land matters and another as to maritime matters is to embark on pure conjecture, wholly unsupported by authority.

The United States Court of Appeals for the Fifth Circuit has held that a State Wrongful Death Act using similar language did not give a cause of action for unseaworthiness. *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (5 C. A. 1953), was a suit brought by a widow of a longshoreman to recover under the Florida Wrongful Death Act (Title 43, Chap. 768, § 1; F. S. A. § 768.01). The longshoreman was killed when a defectively welded link in a chain supporting the weight of a ship's cargo boom parted and the boom fell striking him. The pertinent portion of the Florida Wrongful Death Act reads as follows:

> "Whenever the death of any person in this state shall be caused by the *wrongful act, negligence, carelessness or default* of any individual or individuals * * * (or by the wrongful act, negligence, careless-

> ness or default of any ship, vessel, boat or persons employed thereon), and the act, negligence, carelessness or default, *is such as would, if death had not ensued,* have entitled the party injured thereby to maintain an action, * * * then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued, shall be liable to an action for damages, etc." (Emphasis supplied.)

The libel asserted both the negligence of the owners of the vessel in providing unsafe equipment and the unseaworthiness of the vessel herself. The District Judge held that the words of the Florida Wrongful Death Act limited the causes of death to those occasioned by wrongful act or negligence, and that no cause of action was given for unseaworthiness. At the same time the District Judge conceded that had the plaintiff survived he could have maintained an action predicated upon unseaworthiness by virtue of the decision of this Court in *Seas Shipping Co.* v. *Sieracki, supra,* but since that cause of action under the federal maritime law did not survive his death, his widow was limited to a recovery based on negligence under the state wrongful death act. The United States Court of Appeals for the Fifth Circuit heard the appeal. The same claim was made, i.e., that unseaworthiness, being a cause of action which the deceased would have had if injured only, was therefore available to his representative in the action under the death act. Judge Borah rejected the argument at 206 F. 2d 225, writing as follows:

> "There is a complete absence of merit in appellant's attempt to avoid the foregoing defenses by invoking a right of action for unseaworthiness which, being a right of action the deceased might have maintained had he simply been injured and lived, is clearly not preserved by the legislative enactment under which appellant proceeds. Ake v. Birnbaum,

156 Fla. 735, 25 So. 2d 213, 221;[2] Epps v. Railway Express Agency, Fla., 40 So. 2d 131."

The United States Court of Appeals for the Sixth Circuit has also held that the words "wrongful act," will not support a cause of action predicated upon unseaworthiness. In *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (6 C. A. 1955), the widow of a truck driver instituted suit to recover for his death when he fell from a barge into a river in Tennessee. The original complaint was based upon the Tennessee Death Statute (Title 20, § 607 of the Tennessee Code), and was predicated solely upon the alleged negligence of the barge owner. Upon the trial the plaintiff attempted to amend her complaint so as to allege a cause of action based upon the alleged unseaworthiness of the barge. The Trial Court refused to charge the jury as to unseaworthiness, and the case was accordingly submitted on the issue of negligence only. A verdict for the defendant resulted. The Tennessee Death Statute uses the key words "wrongful act, omission, or killing by another." The Court of Appeals for the Sixth Circuit affirmed the Trial Court's rejection of the requested unseaworthiness charge, stating at page 713 that the statute of Tennessee allowed "recovery only in the event of appellee's negligence."

" [2]The cited en banc decision of the Supreme Court of Florida holds in pertinent part that section 768.01 'gives a right of action to certain statutory beneficiaries for the recovery of damages suffered *by them by reason of the death* of the party killed; but it makes no provision for the recovery of the damages suffered *by the injured person by reason of the injury inflicted upon him.* Nor was the death by wrongful act statute ever intended to afford such remedy. It was not the purpose of the statute to preserve the right of action which the deceased had and might have maintained had he simply been injured and lived; but to create in the expressly enumerated beneficiaris an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal right by the tort-feasor.' (Italics by the court.)"

We submit that there are no authorities which would justify an interpretation of the words "wrongful act, neglect or default" as used in the Wrongful Death Act of the State of New Jersey, to include unseaworthiness.

POINT IV

The Wrongful Death Act of New Jersey is not a survival statute.

As was pointed out in the opening paragraph of the Statement of this brief the libel in question sets forth four causes of action. The first two seek recovery under the New Jersey Wrongful Death Act, whereas the third and fourth causes of action seek to recover for damages accruing to the deceased in terms of conscious pain and suffering, medical expenses, etc. The latter two causes of action were presumably brought pursuant to the New Jersey Survival Statute (Rev. Stat. N. J. 2A:15-2; N. J. S. A. 2A:15-2).

In this respect the State of New Jersey conforms closely to the majority of the States, in that its legislature has enacted both a wrongful death statute and a survival statute. In one, an entirely new cause of action is given to the personal representative of the deceased to recover pecuniary damages which result to the designated beneficiaries by reason of the death. Under the survival statute, however, the damages recoverable by the estate of the deceased are limited to those damages which accrued to the deceased prior to his death. Assume, for example, the case of a person who is severely injured and dies from the injuries sustained after several weeks of hospitalization. Assume further that the widow of the deceased was the sole surviving next of kin. In such a situation the widow of the deceased, as his personal representative, would be entitled to recover under the New Jersey Wrong-

ful Death Act for the pecuniary loss resulting to *her* by reason of the death. That is, she would be entitled to receive money damages to compensate her for the fact that she could no longer expect contributions from the earnings of the deceased. On the other hand, the estate of the deceased would be entitled to recover under the survival statute, not the damages resulting from death, but rather the damages which accrued to the deceased before his death in terms of compensation for pain and suffering during the weeks in the hospital, together with the expenses of the hospitalization, doctor's fees and other items of damage to *him*. The two theories are, of course, entirely different.

Mr. Justice Brennan was sharply aware of the distinction between a survival statute and a wrongful death act in delivering the opinion of this Court in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 (1958). In a footnote to the statement that the Jones Act remedy for wrongful death was exclusive as to members of the crew of the vessel, Mr. Justice Brennan wrote:

> "Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right. See *Holland* v. *Steag, Inc.*, 143 F. Supp. 203; cf. *Cox* v *Roth*, 348 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383."

Mr. Justice Brennan apparently had in mind a situation such as was presented in *Curtis* v. *A. Garcia Y Cia.*, 241 F. 2d 30 (C. A. 3, 1957). Appeals 11,993 and 11,994 in that action concerned two claims by the administratrix of Thomas' estate based upon the Pennsylvania Wrongful Death Act and the Pennsylvania Survival Statute. As stated in the opinion of the United States Court of Appeals for the Third Circuit, the Courts of Pennsylvania had held that the Pennsylvania Wrongful Death Act did not

carry over causes of action which the deceased himself might have had. The ruling of the Pennsylvania Courts on this question is identical to those to be found in the Courts of the State of New Jersey. In the action under the Pennsylvania Wrongful Death Act the contributory negligence of the deceased was held to constitute a bar to recovery, but that very same degree of contributory negligence went only to mitigation of damages in the causes of action based upon the survival statute, since the survival statute preserved the deceased's rights to recover under the federal maritime law. In the *Curtis* case substantial damages had accrued to the deceased himself between the time of injury and the time of his death. As a result, his estate recovered a considerable amount of money under the survival statute portion of the claim, whereas nothing was recovered under the wrongful death act claim.

Libelant's proctor in the instant matter was fully justified in proceeding both under the New Jersey Survival Statute and the New Jersey Wrongful Death Act, but as it turned out, *no* damages were proven which might be recoverable under the New Jersey Survival Statute.

Perhaps as a result of disappointment over the failure to prove damages under the third and fourth causes of action, respondent has urged in the lower Courts that the New Jersey Wrongful Death Act was really a survival statute and that the deceased's causes of action were preserved to the respondent.

The Courts of New Jersey have held otherwise. As we understand it, respondent's argument is predicated upon the words "such as would" which are contained in the opening section of the New Jersey Wrongful Death Act. The argument appears to be that these words in some manner transform the wrongful death act into a parallel of the New Jersey survival statute.

In *Turon* v. *J. & L. Construction Company*, 8 N. J. 543, 556, 86 A. 2d 192 (1952), the Court wrote, in interpreting the New Jersey Wrongful Death Act:

> "This is not a mere survival statute. *It does not abolish the rule that a personal action dies with a person injured. The act creates new causes of action* for the loss suffered by the beneficiaries, measured by the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. • • •
>
> "As said, *it is in no sense the enforcement of an action by survival.*" (Emphasis supplied.)

This interpretation was predicated upon that part of the Act defining the scope of the damages (N. J. S. A. 2A :31-5):

> "In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries *resulting from such death* to the persons entitled to and to any intestate personal property of the decedent." (Emphasis supplied.)

The words "such as would" stem from the British Lord Campbell's Act (9 and 10 Vict. c. 93), from which Act the New Jersey Wrongful Death Act and most of the other wrongful death acts of our States have sprung. *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558, 563, 44 Atl. 630 (1899).

Similar interpretations have been made by the British Courts interpreting Lord Campbell's Act in *Blake* v. *Midland Railway Company*, 18 Q.B. 93, 110, 29 L.J.Q.B. 233, 16 Jur. 562 (1852) and in *Seward* v. *Vera Cruz*, 10 App. Cas. 59 (House of Lords, 1884), holding that the Act was entirely new in its nature and scope, as evidenced by the fact that the damages were not the damages which the deceased would have had, had he survived.

In the previous Point reference was made to the decision of the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223, 225 (5 C. A. 1953), involving a suit brougnt under the Florida Wrongful Death Act, where the claim was made that a recovery could be had for unseaworthiness. The Florida Death Act too contained "such as would" language, and yet Judge Borah rejected the argument that unseaworthiness, being a cause of action which the deceased would have had had he survived, was available to his representative in the action to recover for his death. Judge Borah's decision was predicated upon decisions of the State Court, which held that the Florida Wrongful Death Act was not a survival statute since the damages given were those "sustained by reason of the death of the party killed" and were not the damages which had accrued to the deceased himself.

The Tennessee death statute, which was involved in the decision in *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (6 C. A. 1955), was also commented upon in the previous Point. The statute referred to the cause of action the deceased would "have had against the wrongdoer, if death had not ensued". The Court of Appeals for the Sixth Circuit held that a cause of action for unseaworthiness was not available to Lee's widow, since that cause of action was extinguished at the moment of death.

We submit that the language of the New Jersey Wrongful Death Act does not serve to give to the personal representative of the deceased rights under the federal maritime law, which rights, if any, necessarily must have terminated at the instant of death in accordance with prevailing law.

POINT V

The owners of the vessel did not warrant the seaworthiness of conditions in No. 3 shelter deck to the deceased.

Assuming for the moment that the respondent was entitled to recover, in general terms, under the federal maritime law, the facts show that the petitioners could not have warranted the seaworthiness of the No. 3 shelter deck to the deceased.

The previous Points in this brief have dealt primarily with questions of general law, whereas in discussing this Point it is necessary to refer to the factual record.

The decedent, as Maintenance Foreman for El Dorado Oil Works, met his death when he fell into the port deeptank of the vessel, which deeptank was located in No. 3 shelter deck. The deceased fell into the partially open tank "as he attempted to step on top of the tank" and "slipped on the spilled oil" (R. 573, 582). "His fall was caused by slipping when he had at least one foot already on the lid" (R. 575). At the time of his fall the deceased was approaching the electrical centrifugal pump, owned by El Dorado, which was standing on top of the tank lid. It was the failure of this pump which was the reason for the deceased's being on board at all (R. 573, 582). It was also the failure of this pump which had caused the tremendous oil spill in No. 3 shelter deck of the vessel (R. 582).

The allegedly unseaworthy conditions upon which the respondent might rely and which might be deemed to be proximately related to the death must be limited to the condition of the pump itself, or the oil spill in the No. 3 shelter deck resulting from the failure of the pump. In either case it would be ridiculous to state that the petitioners warranted the seaworthiness of the vessel with respect to either of these conditions to the deceased.

We are not urging that *no* part of m/v Tungus was warranted to the deceased as being seaworthy, but only that El Dorado's pump and the oil spill it created could not have been warranted to the deceased as being free of defects or potential dangers.

If the deceased had met his death in falling from a defective gangway while boarding the vessel or in falling through a rusted and defective deck plate, then an entirely different situation would be presented. Then it might be argued, at least, that the owners of the vessel warranted the seaworthiness of the gangway or of the deck plates, because the deceased was not summoned aboard the vessel to repair either the gangway or the deck plating and was not told that those portions of the vessel were in fact defective and unsafe.

On the other hand, the record makes it abundantly clear that the deceased *was* informed as to the trouble with the pump and did observe the working conditions in the No. 3 shelter deck before going down there to work on the pump (R. 156-8; 219-20; 484-7). The deceased was responsible for the operating condition of the pump and checked it before the arrival of the vessel at the El Dorado pier the previous afternoon (R. 453, 454).

It would be a contradiction of terms to state that a warranty of seaworthiness would be owed to the deceased as to the condition of the pump or the condition of the No. 3 shelter deck caused by the failure of that pump.

Our Courts have lent support to the argument that the warranty of seaworthiness must necessarily be limited in fact situations similar to the one presented. In *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 587 (2 C. A. 1956), the plaintiff sustained injuries when falling through a defective hatch board of the vessel while engaged in setting up a beam across an opening in the ship's deck in connection with the construction of ammunition compartments. Plaintiff was an employee of East Coast Shipyards, an inde-

pendent contractor employed for the purpose of making certain repairs to hatch boards and also for building ammunition compartments aboard. The contract for the work specified among other repairs the renewal of 50% of the wooden hatch covers of the vessel. Before the work was done the independent contractor had the benefit of a survey of the defective hatches made by a port engineer. While aboard the vessel in connection with the construction of the ammunition compartment, the plaintiff fell through one of the defective hatch boards and was injured. In a *per curiam* decision it was held that there was no liability to the injured man under such a set of facts.

A similar situation was presented in *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948). While the vessel in question was being loaded in Philadelphia one of the ship's booms broke in two parts, with the larger section falling across the ship's winches. Arrangements were made with plaintiff's employer to have men furnished to remove the wreckage. Later in the day the plaintiff and 8 other longshoremen arrived at the pier in order to carry out this work. While the wreckage was being cleared, a loose block suspended in the rigging of the boom dropped upon the plaintiff. The plaintiff urged that he was entitled to recover under the traditional warranty of seaworthiness referred to in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). In answering the question as to whether the doctrine of unseaworthiness included objects obviously unseaworthy the Court stated as follows at page 722 of 163 F. 2d:

> "We agree with the district judge that, although seaworthiness normally is a question of fact, Mahnich v. Southern S.S. Co., 1944, 321 U. S. 96, 98, 64 S. Ct. 455, 88 L. Ed. 561, it may be stated as a conclusion of law that no warranty of seaworthiness existed here. Logically construed, liability for an unseaworthy vessel should obtain only when the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unsea-

> worthy. To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally accorded those terms. 'The mere fact that a seaman has been ordered to do a dangerous thing does not establish a case of unseaworthiness. Chelentis v. Luckenbach S.S. Co. 1918, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171'. The Josephine & Mary, 1 Cir., 1941, 120 F. 2d 459 at page 464."

The Court then proceeded to distinguish *Seas Shipping Co.* v. *Sieracki, supra,* by pointing out that the plaintiff in that action suffered injury as the result of a defective appliance which appeared otherwise. In short, the Court held that the doctrine of unseaworthiness was not applicable where the presence of the injured man aboard the vessel was necessitated by and caused by the condition which proximately caused his injury.

This same point has been made in such cases as *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (E. D. La., 1957), and *Filipek* v. *Moore-McCormack Lines,* 156 F. Supp. 854 (E. D. N. Y. 1957, now on appeal to the United States Court of Appeals for the Second Circuit). Also in *McDaniel* v. *M/S Lisholt,* 155 F. Supp. 614 (S. D. N. Y. 1957), aff'd — F. 2nd — (2 C. A. 1958).

As stated in the dissenting opinion of Circuit Judge Hastie (R. 594):

> "In these circumstances Judge Maris and Judge Kalodner would hold, relying upon *Bruszewski* v. *Isthmian SS Co.*, 3d Cir. 1947, 163 F. 2d 270, cert. denied 333 U. S. 828, that, even applying concepts of the maritime law, a shipowner does not warrant, to one so situated and informed as this workman, that the deck is free of oil or of the obvious hazards incidental to the presence of that substance. However, I am content to rest my dissent solely upon the construction and application of the New Jersey law, without examining the reach of the unseaworthiness doctrine, if maritime law were applicable."

Bearing in mind the fact that the deceased was fully aware of conditions in the No. 3 shelter deck, not only from having been informed about them over the telephone, but as a result of having been in the area itself for some 10 or 15 minutes (R. 158, 219-20, 484-6), we fail to see how it can be stated that the petitioners warranted conditions in the shelter deck to him, when the very reason for his presence aboard was that his pump had failed, and in failing had created the disastrous oil spill on which he eventually slipped and fell to his death. We fail to see how the defective pump or the oil spill created by that pump could have been warranted as seaworthy to one in the category of this deceased, who was necessarily familiar with pumps and their maintenance as well as with the characteristics of the vegetable oil products handled by his employer. The deceased was not an innocent passerby, but came aboard with full knowledge of the facts because the pump for whose proper operation he was responsible had failed and in failing had created the conditions now complained of.

POINT VI

The petitioners cannot be held liable to the respondent in terms of negligence under applicable decisions of the Courts of the State of New Jersey.

It has been urged by the respondent in the lower Courts that the shipowner would be liable for actionable negligence for not having provided the deceased with a safe place to work.

Upon the trial of the action the allegations as to negligence were directed towards claimed inadequate lighting in the shelter deck, the claim that the port deeptank should not have been partially opened, the claim that two steel hatch beams obstructed the passageway between the two tanks, and finally the claim that the members of the crew of the vessel should have cleaned up the oil spill in No. 3

shelter deck before the deceased was allowed to work on his pump. The first three grounds mentioned were effectively eliminated by the Trial Judge in his opinion (R. 574-5). They did not even warrant discussion by the majority or dissenting Judges of the United States Court of Appeals for the Third Circuit. There remains the question of alleged negligence in connection with not having cleaned up the oil spill.

The Trial Judge posed the question in the following terms (R. 575):

> "As to (4), the issue correctly is stated by respondent [petitioners]: Whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill".

In deciding that issue the Trial Judge stated (R. 576):

> "I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. Accordingly, the court finds that the respondents are not liable for Skovgaard's unfortunate death and the libel must be dismissed."

During the course of his opinion, which constituted as well his findings of fact, the Trial Judge found that:

> "The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump." (R. 576)

The majority opinion of the United States Court of Appeals for the Third Circuit did not set aside the above finding of fact as "clearly erroneous," which is the standard prescribed by Rule 52(a) of the Federal Rules of Civil Procedure.

In *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), this Court held that no greater scope of review was exercised by the Courts of Appeal in admiralty cases than that prescribed by Rule 52(a) of the Federal Rules of Civil Procedure.

The majority of the United States Court of Appeals prefaced their discussion of negligence liability by stating (R. 587):

> "While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, especially since El Dorado's supervision was not so complete as to exclude crew members from the area. In fact, it was the crew which first discovered the oil leakage and adopted temporary measures to stop it."

The majority bench below then proceeded to cite a number of cases, all of which were decided under the federal maritime law, since they involved cases of injury and not of death.

The three dissenting Judges of the United States Court of Appeals for the Third Circuit, in the opinion by Circuit Judge Hastie, took strong exception to the majority's position on the issue of negligence. Judge Hastie prefaced his discussion of the point in the following terms (R. 595):

> "This case has a second aspect. The libellant undertook to prove that, quite apart from unseaworthiness, the shipowner was responsible for actionable negligence on the part of the ship's personnel in not providing the decedent with a reasonably safe place to work. On the evidence and the findings we think the defendant was entitled to judgment on this branch of the case."

In discussing this aspect of the case it is necessary to refer to the transcript of the trial testimony to determine

the true degree of supervision and control exercised by the El Dorado pump crew and by the crew of the vessel over the discharge of the oil and the repair of the pump.

First of all, the electrical discharge pump, together with its accessories, including the suction and discharge lines, the source of electrical supply, and the air injection nipple whose fracture was the cause of the oil spill, all belonged to El Dorado. Ownership of the entire pump assembly and its accessories was admitted by El Dorado in answer to interrogatories 27, 28, 29 and 30 which were addressed to it by petitioners (R. 57-8, 62). The testimony of the various witnesses upon the trial did not vary on these points. Nor is it disputed that El Dorado and its employees were aboard m/v Tungus to discharge the contents of the port deep tank at the request of Pacific Vegetable Oil Company, the then owner of that shipment (R. 54-5, 60-1).

After m/v Tungus came alongside El Dorado's pier in Bayonne, New Jersey, the first thing to be done was to have the port deep tank opened in order to gain access to the oil. One officer and two members of the ship's crew assisted the El Doralo personnel in loading the discharging pump aboard the vessel (R. 299, 300). The function of these crew members was described by the Norwegian Chief Officer in the following terms (R. 299):

> "Well, during any discharge of any tank the ship, as a courtesy, always gives the company some of the crew members to help them, to be used for ship's equipment, to drive winches, and to hoist their equipment on board the ship."

The lifting and the placement of the tank lid was directed by El Dorado's employees. Mr. Blaney, the Plant Superintendent for El Dorado, testified that the complete discharging was under the direction of Patrick Sexton (R. 430).

The next order of business was to lift El Dorado's pump from the pier and lower it into the hatch and on top of the tank lid. With members of ship's crew driving the ship's winches this job was directed by El Dorado personnel as well. Mr. O'Leary, an El Dorado employee, who worked as a mechanic under the deceased, admitted that he was down in No. 3 shelter deck for the express purpose of arranging for a firm foundation for his pump (R. 461). He was completely satisfied with the way the pump had been placed before the suction and discharge hoses were brought aboard (R. 461). Mr. Blaney, the Plant Superintendent for El Dorado, admitted that the placement of the pump was determined by one of the employees of El Dorado (R. 239).

The ship's winches were then used to bring the suction and discharge hoses aboard the vessel for connecting to the pump, and, with the two members of the ship's crew driving the winches, the hoses were held by the winches and booms while the El Dorado personnel bolted the hoses into position (R. 461-2).

Judge Staley seems to make much of the fact that it was one of the members of the crew of m/v Tungus who "first discovered the oil leakage" (R. 587). We submit, however, that the discovery of the leak by the mate on watch most certainly did not indicate any degree of control by the officers or members of crew over the discharge. It will be recalled that when the burst in the pump was discovered by one of the officers making a routine tour of the decks, none of the El Dorado crew were in attendance, much less even aboard the vessel (R. 304; Exh. R-6, 560, 298). This absence from the vessel was contrary to the instructions of El Dorado, the employer of the pump crew (R. 57, 62). The Chief Officer testified under cross-examination that never before in his experience had he known members of a pump crew to leave their pump unattended during the course of discharging (R. 327).

Nor does the fact, as pointed out by Judge Staley (R. 587), that the personnel of m/v Tungus were aware of the existence of the oil spill spell out control or liability. It is difficult to conceive of how the officers of the vessel could have been unaware of the oil spill, when it was one of them who happened to discover the oil spill in the first place.

Judge Staley stated that the ship's crew adopted temporary measures to stop the oil leakage (R. 587). The fact of the matter is that none of the ship's crew even knew how to turn off El Dorado's pump. That is why it was necessary for an officer of the vessel to go ashore in order to find one of the El Dorado employees to have him turn off the pump, which in the meantime continued to pump hot liquid oil into No. 3 shelter deck until finally stopped (R. 188, 304). The pump was turned off eventually by one of El Dorado's men (R. 188, 304), and, according to the testimony of one of the El Dorado employees, members of the ship's crew drove a wooden peg into the fractured opening in the pump, not to stop the pumping operation, but to stop the backflow of oil in the discharge line and thereby reduce the extent of the spill (R. 188).

While the El Dorado pump crew were trying to repair the pump and restore it to operation, the Chief Officer of the vessel and Mr. Mallett (the cargo surveyor) went down into No. 3 shelter deck in order to examine the extent of the damage done by the spilled oil to general dry cargo which was stowed in the forward portion of the shelter deck and in the No. 3 hold, one deck below the shelter deck (R. 270-1, 304-5). As a result of that inspection the Chief Officer asked Mr. Sexton to sign a statement conceding liability for the damage done to the general cargo (R. 305), which Mr. Sexton refused to do (R. 508).

The Record is clear on the point that the employees of El Dorado maintained control over the repair of the pump and the clean-up operation in the interval between the

time the pump was turned off and the time the deceased fell into the open tank.

Mr. Russo, who was supposed to be in charge of the operation of the pump at the time the burst occurred, testified that the officers of the vessel had nothing to do with the servicing or care of the pump and had nothing to do with telling the El Dorado employees whether or not they should or could proceed with the pumping (R. 221). It is significant that under questioning by the Court Russo testified that the El Dorado employees had not asked the members of the ship's crew to clean up any oil in the No. 3 shelter deck after the pump had burst (R. 207). Quite the opposite, for the record is replete with testimony to the effect that the El Dorado employees, including Mr. Russo, had themselves cleaned up the oil spill in the working area around the pump by squeegeeing the oil off the tank top (R. 155, 176-7, 199, 444, 491-3, 495). Whereas Russo testified at first (R. 207) that he thought some of the ship's crew were cleaning up in the forward part of No. 3 shelter deck, where the general cargo was stowed, his later testimony made it quite clear that he had not seen them cleaning up at all, but that they were actually taking off the wooden hatch boards in order to see what damage had been done to the cargo in No. 3 hold by the liquid coconut oil (R. 210).

We argue strongly, against Judge Staley's conclusion that the presence of the officer in the hatch indicated that "El Dorado's supervision [of the pump repair operation] was not so complete as to exclude crew members from the area" (R. 587).

The fact that the El Dorado employees were in control of the pumping operation did not mean that the Chief Officer of the vessel or the cargo surveyor had to be excluded from the shelter deck, because the forward part of the shelter deck contained general cargo with which El Dorado was in no way concerned. The presence of the Chief

Officer and the surveyor in the forward part of No. 3 shelter deck conducting inspections of the damage done to other cargo in the hatch in no way diminished El Dorado's control over the pumping operation.

For Judge Staley to say that "it may be true that El Dorado supervised the pump repair operation" (R. 587), is to understate the true facts, because there is not one word of testimony anywhere in the record pointing to the fact that the officers or members of the crew of the vessel had *anything* to do with the repair of the pump.

As has been pointed out earlier in this brief the Chief Officer offered sand or sawdust to Mr. Sexton, the El Dorado man in charge. He also testified that sawdust had actually been given to Mr. Sexton for spreading in the No. 3 shelter deck after the oil spill and before the deceased fell into the tank (R. 309, 331). The offer, according to the Chief Officer, was rejected by Mr. Sexton, whereas Sexton himself denied that the offer had ever been made. The testimony on this issue was most significant, for under questioning by the Court the Chief Officer made it clear that he could do no more than suggest to Mr. Sexton that the sawdust be used, and that he was in no position to order Mr. Sexton to do anything at all, since Mr. Sexton was not one of his crew, and Sexton took orders only from his immediate superiors in El Dorado Oil Works (R. 347-8). It will be remembered that El Dorado was not engaged by petitioners.

Assuming for the moment that the testimony of the Chief Officer (as backed up by the contemporaneous log entry) was correct as to his offer of sand or sawdust, one might wonder why the offer was refused. Mr. Sexton's testimony on this point should be noted, because he testified that at the time the alleged offer was made he, Sexton, was of the opinion that neither sand nor sawdust were necessary, because his men had already squeegeed the

working area (R. 492, 493). Mr. Sexton agreed that the Chief Officer was in no position to tell him, Sexton, what should be done in the No. 3 shelter deck after the oil spill. The questions of counsel and the answers of Mr. Sexton were as follows (R. 493):

> "Q. Now, as receiving clerk in charge of receiving the oil, it would be up to you to say whether or not anything could be put on that oil so it wouldn't be left slippery, isn't that so? A. That is so, yes.
>
> Q. And after inspecting that area you gave no instructions to the men that were working there, is that correct? A. In my opinion, at that time, I thought that the area was clean enough. They [El Dorado employees] had squeegeed it."

Mr. Sexton conceded that he was in charge in the deep-tank area of No. 3 shelter deck, and that he was in a position to veto or overrule any suggestions or orders which might be given to him with respect to the operation of the pump, the discharge of the oil, or the contamination of the spilled oil. The word contamination is used advisedly, since it was the intention of the El Dorado personnel to salvage the spilled oil so as to insure receipt of as much of the oil as possible from the vessel. It is interesting to note that Donohue, one of the El Dorado pump crew, and Sexton both conceded that they had signed written statements within a couple of days of the accident in which they stated that it was their intention to salvage the spilled oil (R. 179-80, 480, 491). Naturally, if the oil had been contaminated with either sand or sawdust, such salvage would have been impossible.

Mr. O'Leary, an El Dorado employee, who arrived on board the vessel two hours after the accident, testified that when he observed the No. 3 shelter deck at that time ropes had been put around the tank opening and sawdust had been spread on the spill. Such testimony is wholly irrelevant to a determination of liability, but is significant in

deciding who was in control of the area at the time of the accident itself. After the accident, which occurred at 1:25 A. M. all the El Dorado employees on the ship walked off the job. O'Leary himself was the first to return (R. 470), and he did not return until 3:30 in the morning (Exh. R-6, R. 560, 297). The El Dorado crew did not even resume pumping until 6:20 A. M. (Exh. R-4, R. 554, 266; Exh. R-6, R. 560, 297). Any corrective measures which may have been taken by the ship's crew were taken only after the El Dorado employees had abandoned the vessel. From Mr. Sexton's testimony it is obvious that he would not have tolerated such measures had he still been aboard the vessel at the time.

We feel that these facts are important to point out the tremendous distinctions which exist between this case and the usual longshore injury case, where it is not unusual to find that the officers of the vessel were supervising the longshoremen and the discharge of the cargo, where the vessel engaged the longshoremen and was responsible to the shippers and/or consignees of the cargo for its safe discharge and where the vessel supplied the gear to effect that discharge. We have here a totally different situation—one in which the obligation to discharge and the obligation to provide equipment and personnel for the discharge were those of the consignee of the cargo, Pacific Vegetable Oil Company, which in turn hired El Dorado to carry out that obligation (R. 54-5, 60-1).

We submit that the Trial Judge was amply supported by the trial record when he stated (R. 576):

> "The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised and controlled either the discharge of the oil from the tank or the repair of the pump."

It is against such a background that we must determine "whether during the repair operations it was the

vessel's duty to the deceased to clean up the oil spill" (R. 575).

In support of his point that petitioners owed a duty to the deceased to provide him with a safe place to work with particular reference to the oil spill in No. 3 shelter deck, Judge Staley relied upon two cases—*Pope & Talbot Inc.* v. *Hawn*, 198 F. 2d 803 (C. A. 3, 1952), affirmed 346 U. S. 406 (1953), and *Feinman* v. *A. H. Bull Steamship Co.*, 216 F. 2d 393 (3 C. A. 1954).

Both these cases are clearly distinguishable on at least two grounds. First, both cases involved *injuries* occurring aboard vessels on navigable waters, and as a result the cases were decided under the federal maritime law and not under state law. Second, in both instances the failures to provide safe places to work and the resulting injuries had not the remotest connection with the particular work which was being done by the injured men.

Hawn was a ship's carpenter foreman who was aboard the vessel making certain minor adjustments to the grain feeders while the vessel was berthed in the Delaware River at Philadelphia. As he was moving about the hatch of the vessel giving instructions to his men he fell through an opening caused by the absence of one of the wooden hatch boards of the vessel. He sustained substantial injuries. The fact that the hatch board was not in place had nothing to do with the work being performed by the plaintiff and his men aboard the vessel. The plaintiff was not aboard to repair or replace wooden hatch boards. He was aboard for a totally different reason—to construct and make minor alterations in the grain feeders aboard the vessel.

Most important is the very clear statement of Mr. Justice Black, in delivering the opinion of this Court to the effect that Hawn's rights were to be determined under the federal maritime law and not under the laws of the

State of Pennsylvania. Mr. Justice Black wrote as follows at 346 U. S. 409:

> "(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features * * *,' *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling Acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. See *e.g.*, *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited."

Feinman v. *A. H. Bull Steamship Co., supra,* concerned an injury to a marine electrician, employed by Sun Shipbuilding and Drydock Company, to recover for injuries sustained by him when he was struck by a falling hatch beam while working aboard a vessel owned and operated by A. H. Bull Steamship Company. The vessel was in navigable waters at the time. As such, there was no question but that Feinman's rights were defined by the federal maritime law rather than by the laws of the State of Pennsylvania. It is also obvious from the opinion that neither

Feinman nor his fellow employees had anything whatsoever to do with the condition of this hatch beam, and that they were entitled to rely upon the fact that it should have been securely locked in position while they were aboard.

The reliance of the majority below on these two cases is a further demonstration of the fact that they have ignored the negligence principles in effect in the Courts of the State of New Jersey, in a case where they have professed to concede that the Wrongful Death Act of the State of New Jersey provides the sole basis for a recovery by the respondent.

We submit that the decisions of the courts of the State of New Jersey are most instructive in determining "whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill" (R. 575). In *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3, 24 A. 2d 194 (1942), it was held that a danger which was obvious to a business visitor did not constitute a breach of duty to provide him with a safe place to work. An action was there brought to recover damages for the death of plaintiff's decedent, who had been killed as a result of a fall through a defective roof. The deceased was an employee of a roofing concern and was engaged in repairing and replacing the roof in question. A non-suit was granted by the Judge in the Supreme Court, which non-suit was subsequently affirmed by the Court of Errors and Appeals in a unanimous opinion delivered by Judge Case. Judge Case pointed out at 128 N. J. L. 4 that there was no proof in the record that defendant had exercised any authority over the contractor or its employees as to the methods which were to be followed or the precautions which were to be taken in the performance of the work. The Court held that the defendant was under no duty to provide the deceased with a safe place to work, and wrote at 128 N. J. L. 7 as follows:

"In our opinion the logic of the situation requires that there be a further exception in such a state of facts as exists when an independent contractor, or the employee of an independent contractor, comes upon lands, at the instance of the owner or occupier, to correct the precise condition which causes the injury. The restoration or repair of a rotted roof is not per se an act of negligence. That the rotted condition results in injury to the employee of an independent contractor who, without supervision or control by the owner or occupier, undertakes by his own methods and materials to do the job does not manifest negligence on the part of the contractee. As well might it be said that a contractor, employed to level the uneven condition of a sidewalk, may recover from his contractee for injuries which he receives in the course of his work by stumbling over the very obstacle which he is engaged to remove. It is said by the appellant that the deceased workman should have been provided with a scaffolding built under the roof so that he need not have walked upon the weakened board; but that was a problem for the contractor, who undertook to do the work. *Before recovery may be had a duty must exist in point of law and a failure in that duty must be proved in point of fact. It is hard to see how the person who engages an independent contractor is under any duty to guard the servants of the latter against the very danger that arises from their work.*" (Emphasis supplied.)

The reasoning is similar to that of the United States Courts of Appeals for the Second and Third Circuits, respectively, in the cases of *Byars* v. *Moore-McCormack Lines*, 155 F. 2d 587 (2 C. A. 1956), and *Bruszewski* v. *Isthmian S. S. Co.*, 163 F. 2d 720 (3 C. A. 1947), cert. den. 333 U. S. 828 (1948), both of which were discussed in the preceding Point.

As a matter of fact, the instant fact situation is even stronger than that presented in the *Broecker* case. The hole in the roof in that case was not created by the em-

ployees of the roofing concern, whereas the El Dorado Oil Works, through its employees, including the deceased, was most intimately at fault in the creation of the oil spill in the No. 3 shelter deck of m/v Tungus.

The instant fact situation is also stronger than that presented in the *Broecker* case in that this independent contractor, El Dorado Oil Works, was not engaged by petitioners. The owner of the cargo, Pacific Vegetable Oil Company, and not petitioners, were the ones who selected El Dorado and who ordered El Dorado to go aboard m/v Tungus to discharge the contents of the port deep tank. The petitioners did not even have a chance to select a competent contractor.

The testimony of Mr. Sexton makes it plain enough that he would have brooked no interference by the officers of the ship with the discharging of the oil or the repairs of the pump. The petitioners, not having hired the independent contractor to begin with, were in no position to enforce suggestions or orders given to the employees of that independent contractor.

Judge Staley tried to avoid the impact of the *Broecker* decision by stating that Skovgaard's death was not caused by the pump he was to repair, but rather by the oil spill. We respectfully submit that the distinction is so fine as to be meaningless. The breakdown of the pump and the spilling of the oil in the shelter deck are inseparable. The Record makes it abundantly clear that the petitioners had as little control over what was to be done with the spilled oil as they did over the operations and repairs of the pump. In going down into the shelter deck to repair the pump the deceased was fully aware of the conditions created by the failure of his pump. In line with the reasoning of the Court in the *Broecker* case, the oil spill was a danger which arose from Skovgaard's work as Maintenance Foreman for a vegetable oil storage and processing plant.

In *Mergel* v. *Colgate-Palmolive-Peet Co.*, 41 N. J. Super. 372, 125 A. 2d 292 (1956), the Superior Court cited with approval the foregoing language from the *Broecker* opinion, and added at page 379:

> "It has long been the law of the State that an employee assumes all those risks which are ordinarily incidental to his employment as well as those dangers which are plain and obvious to a person of ordinary understanding and judgment [citations]".

In the instant matter the record shows beyond question that the oil spill created by El Dorado's pump in the 'tween deck of m/v Tungus was apparent, obvious and known to the decedent. The record also shows that the deceased was responsible for checking the condition of the pump before the job was started. The failure of the pump and the resulting oil spill were the responsibilities of the deceased.

Under such conditions the Courts of New Jersey would deny recovery to this libelant. No different result should obtain because the forum was a federal court and not one of the courts of the State of New Jersey.

In further support of the stand taken by the Courts of the State of New Jersey on this point we refer to the decision of the Supreme Court of the State of New Jersey in *Lokar* v. *Church of the Sacred Heart*, 24 N. J. 549, 133 A. 2d 12 (1957). At page 553 the Court held:

> "The possessor of land is not liable to one rightfully on the premises for injuries attributable to dangers that are obvious or as well known to the user of the lands as to the possessor."

Again, we have the case of *Newbury* v. *American Stores Co.*, 115 N. J. L. 604, 180 Atl. 875 (1935), a decision of the Court of Errors and Appeals of the State of New Jersey referred to by Judge Hastie in his dissenting opinion in the instant matter. In ruling on the obligation of the owner

of premises to invitees for defective conditions of the premises the Court of Errors and Appeals wrote:

> "It is axiomatic that the rule that one who enters a store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case."

The foregoing decisions should be binding in this case.

We submit that the Trial Judge was correct in stating that the owners of this vessel were under no duty to protect the deceased against the dangerous conditions which his fellow employees and his equipment had created during the course of the very work for which they were hired. Judge Staley and the other majority Judges below misconceived the nature of the operation and overlooked the obvious limitation of the authority of the Chief Officer over El Dorado's employees. They also applied federal admiralty concepts to define a state-created death claim.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed and the libel dismissed.

Dated, New York, N. Y., September 4, 1958.

Respectfully submitted,

J. WARD O'NEILL,
Counsel for Petitioners.

DAVID P. H. WATSON,
of Counsel.